

FEDERAL MARITIME COMMISSION

SPECIAL DOCKET NO. 1826

APPLICATION OF OOCL (USA) INC.,
FOR THE BENEFIT OF CONNELL BROS. COMPANY, LTD.

ORDER OF ADOPTION OF INITIAL DECISION

The proceeding is before the Federal Maritime Commission ("Commission" or "FMC") on Exceptions of OOCL to the Initial Decision of Administrative Law Judge Norman D. Kline ("ALJ" or "Presiding Officer").

BACKGROUND

OOCL (USA) Inc. ("OOCL"), an ocean common carrier, applied pursuant to section 8(e) of the Shipping Act of 1984 ("1984 Act"), 46 U.S.C. § 1707(e), for permission to waive collection of a portion of freight charges on seven shipments of bentonite clay carried from Memphis, Tennessee through the port of Long Beach, California, to Manila, the Philippines. Because of several consecutive errors, OOCL did not have in its tariff the intermodal per container commodity rate it intended to apply to those shipments.¹ As a result, the shipments were subject to the N.O.S. ("not otherwise specified") rate of \$1,604.00 per ton. Total freight charges amounted to \$1,204,189.63. The intended rate was ultimately filed on September 20, 1989.

¹Affidavit of Ms. Kevis Brownson, OOCL's Traffic Service Manager, executed March 20, 1990 - Exhibits 10, 12, 13 and 15.

The first shipment, which is the subject of OOCL's Exceptions, sailed from Long Beach on July 11, 1989,² 184 days before January 11, 1990, the date of filing of the application.³ OOCL collected \$1,863 on that shipment, whereas computed at the N.O.S. rate, total charges amounted to \$28,603.96.

According to information subsequently obtained by the ALJ, the FMC Bureau of Investigations in San Francisco requested OOCL on November 30, 1989, to submit some tariff pages relating to the shipments in question. OOCL complied with the request on December 15, 1989. Subsequently, on January 5, 1990, Mr. Hal Rolnitzky, the FMC investigator ("Investigator"), visited OOCL's office in Oakland, stated that he was investigating OOCL's possible misrating of a shipment, and was given additional tariff pages and bills of lading. Upon reviewing those documents, Mr. Rolnitzky on January 10, 1990 suggested that OOCL apply to the Commission for waivers. As mentioned, OOCL filed its application the following day.

THE INITIAL DECISION

The Presiding Officer granted waivers in the amount of \$1,098,195.66 for the six shipments which sailed in August and September 1989. As to the first shipment, he held that under section 8(e)(4) of the 1984 Act the Commission had no jurisdiction

²The other six shipments sailed between August 1, 1989 and September 19, 1989.

³OOCL mentioned 182 days. Otherwise, the facts are uncontested.

to grant a waiver because the shipment was transported more than 180 days after the application was filed.⁴

The ALJ rejected OOCL's argument that the Commission should allow the application to relate back to January 5, 1990, when OOCL furnished the relevant tariff pages to the Investigator and thereby allegedly put the Commission on notice of the tariff error and of the need for waivers. He also rejected the argument that, in the alternative, the running of the statute of limitations should be tolled on January 5, 1990 when OOCL could have filed the application timely, but for the Investigator's alleged advice to take no action until he had reviewed the documents in his possession.⁵

The "relate back" doctrine, the ALJ pointed out, applies only when a complaint or application is subjected to rejection because of some technical defect, and the amended pleading does not change

⁴Section 8 of the 1984 Act provides:

(e) Refunds--The Commission may, upon application of a carrier or shipper, permit a common carrier . . . to refund a portion of freight charges or waive collection of a portion of the freight charges from a shipper if

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(4) the application for refund or waiver is filed with the Commission within 180 days from the date of shipment. 46 U.S.C. § 1707(e)(4).

The "date of shipment" is the date of sailing of the vessel from the port at which the cargo was loaded. Rule 92(3)(iii) of the Rules of Practice and Procedure. 46 C.F.R. § 502.92(3)(iii).

⁵Letter of David R. Kay, Esquire, attorney for OOCL, dated March 21, 1990.

the essential nature of the claim.⁶ The ALJ noted that in all the precedents cited, the parties had originally filed a complaint or special docket application to which the amended pleading could relate back. The "informal submissions" here which consisted of tariff pages and bills of lading did not in the ALJ's opinion, constitute a filing of an application to which later pleadings could refer back. The ALJ relied on Schweiker v. Hansen, 450 U.S. 785 (1981), where the Court stated that when Congress had expressly delegated to the agency the authority to regulate the manner for applying for benefits, a court could not disregard the requirement that the application be in writing.

The ALJ also rejected the argument that the running of the 180-day period should be tolled because of OOCL's reliance on the Investigator's advice to take no action until he had reviewed the documents in his possession. He cited Application of U.S. Atlantic and Gulf-Jamaica and Hispaniola Freight Association for Chiquita, 22 S.R.R. 1044, reconsideration denied, 22 S.R.R. 1266 (1984), where the Commission affirmed the principle that the 180-day period was jurisdictional and could not be tolled on equitable grounds.⁷ Furthermore, because OOCL had filed the corrective tariff on

⁶I.D. at 11.

⁷The Commission pointed out that the 180-day period was a precise mathematical concept which was not subject to interpretation.

The ALJ also referred to Heckler v. Community Health Services, 467 U.S. 51 (1984), where the Court held that a health care provider could not recover from the Government notwithstanding his reliance on the incorrect advice from a government agent.

September 20, 1989, and had offered no acceptable reasonable grounds for the over three-month delay in filing the application, the equities, in the ALJ's opinion, were not on OOCL's side in any event.

The ALJ concluded that the Commission's jurisdiction has been limited by Congress to shipments which have occurred within the 180-day period. OOCL's failure to file the application within 180 days from the date of sailing of the first shipment therefore was held to deprive the Commission of jurisdiction to grant a waiver for that shipment.

OOCL'S EXCEPTIONS

OOCL excepts to the ALJ's finding that the January 11, 1990 application could not relate back to OOCL's January 5, 1990 submissions. Citing Nepera Chemical, Inc. v. FMC, 662 F.2d 18 (D.C. Cir. 1981), OOCL argues that the Commission's primary duty is "to realize, whenever possible, the remedial purpose of the statute." OOCL relies also on TDK Electronics Co. Ltd. v. Japan Lines Ltd., 19 S.R.R. 1724 (1980), where the Commission allowed an amended complaint to relate back to the date of the original filing.⁸

⁸In that case, the Secretary of the Commission had rejected a claim filed under the informal docket procedure. In view of the amount involved, a formal complaint should have been filed. The presiding administrative law judge held that the formal complaint, filed after the expiration of the statutory limit, was time barred. The Commission reversed, holding the defect was procedural, not jurisdictional. The original filing gave notice to the parties of the relief requested and was, therefore, deemed sufficient to toll the statute of limitations.

OOCL challenges the finding that its earlier submissions were jurisdictionally defective. It maintains that by ruling that the application was improper the ALJ elevated form over substance.

Further, OOCL takes issue with the ALJ's ruling that there is no legal authority for the proposition that OOCL's informal written submissions tolled the statute of limitations. OOCL argues that in a number of federal cases a timely informal written submission, provided it gave "some" notice to the agency, was found to satisfy the requirement for a formal written claim.

OOCL moreover questions the ALJ's finding that OOCL's initial submissions did not give sufficient "notice" to the Commission. OOCL maintains "the Commission's investigator was able to determine from his investigation and meetings with OOCL's staff that there was a tariff filing error, that the shippers were entitled to waivers"

Finally, OOCL excepts to the finding that Schweiker v. Hansen mandates the denial of its application. In Schweiker, OOCL maintains, there was no earlier written submission of any kind to which the subsequent application could relate back.

DISCUSSION

The issues raised by OOCL are:

(a) whether the "informal submission", i.e. tender of certain tariff pages and bills of lading to the FMC Investigator, amounts to the filing of an application within the meaning of section

8(e)(4) of the 1984 Act to which the application subsequently filed could relate back;⁹ and

(b) whether the 180-day limitation period should be tolled because of OOCL's reliance on the Investigator's advice that nothing be done until he had had an opportunity to review the documents in his possession.

Each of these issues is addressed in turn below.

A. Relation Back Based on Informal Submission

OOCL's argument that the "informal submissions" showed OOCL's intent to ask for waivers is not persuasive. The statute is unambiguous - it requires that the application be filed. The expression of an intent to file is, therefore, irrelevant.¹⁰

Furthermore, the tariff pages handed over to the Investigator in January 1990 had already been filed with the Commission in September 1989, not when delivered to the Investigator on January 5th.¹¹ This leaves the bills of lading as the only

⁹See note No. 4, supra.

¹⁰An application is filed when it is placed in the mail, delivered to a courier, or, if delivered by another method, when it is received by the Commission. Rule 92(a)(3)(i), 46 C.F.R. § 502.92(a)(3)(i). Cf. Rule 63 of the FMC's Rules of Practice and Procedure which provides that notification to the Commission of an intent to file a complaint will not constitute filing within the applicable statutory period. 46 C.F.R. § 502.63.

¹¹Part 580 -- Publishing and Filing of Tariffs by Common Carriers in the Foreign Commerce of the United States. 580.3 Filing of Tariffs reads in part:

(a)(1) As used in this part the terms "file," "filed" or "filing," when used with respect to the filing of tariffs with the Commission, mean actual receipt at the Commission's Washington, D.C. offices.

"informal submission" given to the Investigator which OOCL argues should be treated as an application. In fact, nothing resembling an application was filed on January 5, 1990.¹²

In Application of OOCL - Seapac Services, Inc. for the Benefit of Asian Food Industries (HK) Ltd., 23 S.R.R. 791 (1986), OOCL made much the same argument it is making here. There, prior to submitting its application, OOCL had failed to file the corrected tariff required by section 8(e)(2) of the 1984 Act. The administrative law judge advised OOCL of the need to file a new tariff and refile the application. OOCL timely filed the corrected tariff but only refiled the application after the expiration of the statutory period. The administrative law judge denied relief for lack of jurisdiction. On exceptions OOCL argued that the Commission should consider the date of filing of the corrected tariff as the date of the refileing of the application. The Commission disagreed:

The statute . . . requires the filing of a new tariff "prior to" the filing of the application, that is the filing of two separate instruments which may not by their nature be merged into one. 23 S.R.R. at 793.

¹²In Boulez v. C.I.R., 810 F.2d 209 (D.C. Cir. 1987), the taxpayer had entered an oral compromise with the Director of Internal Operations regarding late filing and payments of tax deficiencies. Treasury regulations required that the agreement be in writing. The U.S. Court of Appeals for the District of Columbia Circuit rejected the argument that the enforcement of the writing requirement reflected a "technical procedural approach":

We are not dealing with a mere housekeeping provision, but with a fundamental tenet of formalizing agreements.
. . . . 810 F.2d at 216.

With respect to OOCL's argument that by rejecting its "informal submissions" the ALJ elevated form over substance, the Commission, as a matter of policy, does not reject an application which fails to adhere to the prescribed form.¹³

B. Tolling of the Statute

OOCL's argument on the tolling of the statute of limitations is also without merit. The Commission has consistently held that after the expiration of the statutory period it has no longer any authority to grant the relief provided in section 8(e) of the Act.¹⁴ Application of U.S. Atlantic and Gulf-Jamaica and Hispaniola Freight Association for Chiquita, supra, and Application of Sea-Land Corporation on Behalf of Sea-Land Service, Inc. as Agent for Pana-York Shipping Corporation/Frito Lay, 23 S.R.R. 1157 (1986). See also Application of Lykes Bros. S.S. Co., Inc. for the Benefit of Embassy of Tunisia, 23 S.R.R. 1157 (1986); U.S. Borax Chem. Corp. v. Pac. Coast European Conf., 11 F.M.C. 451, 471 (1968), citing Holmberg v. Armbrecht, 327 U.S. 392 (1945):

It is well settled that if Congress explicitly puts a limit upon time for enforcing a right which it creates, the congressional statute of limitations is definitive. (327 U.S. at 395).

In Nepera, supra, the case cited as support for OOCL's position to the contrary, the administrative law judge rejected the

¹³See ALJ's letter dated February 21, 1990.

¹⁴However, even if tolling the statute were an option, OOCL, as the ALJ pointed out, has given no reasonable explanation for its delay in filing the application. "One who fails to act diligently cannot evoke equitable principles to excuse that lack of diligence." Baldwin County Welcome Center v. Brown, 466 U.S. 147, 151 (1984); Westmoreland v. Laird, 364 F.Supp. 948 (S.D.N.Y. 1973).

corrected tariff filed prior to the application because, in his opinion, it did not reflect the rate agreed upon between the carrier and the shipper.¹⁵ On appeal, the court held that the carrier had in fact filed the intended rate as the slight difference between the rate shown in the corrected tariff and the intended rate resulted from the conversion of the rate from a 2200 pounds per ton basis to a per hundredweight (cwt) basis. While the court, in so doing, emphasized the remedial purpose of the statute, the court also made it clear that its decision did not in any manner signify a disregard of the four jurisdictional requirements of the statute. American Radiator and Standard Sanitary Corporation v. U.S., 318 F.2d 915 (Ct. of Cl. 1963) and Night Hawk Leasing Co. v. U.S., 18 F.Supp. 938 (Ct. of Cl. 1937), also relied on by OOCL, do not require a different result. There, audits were conducted by tax collectors of the taxpayers' income tax returns. Annotations and figures on the taxpayers' income tax return and/or on the back of tax payment checks were viewed as informal claims to which later formal claims were permitted to relate back. The court held that, in view of the particular circumstances, the timely notice of intent to file a claim constituted a valid informal claim, sufficient to toll the statute of limitations. Under section 8(e)(4) of the 1984 Act, however, short of actual filing, the showing of a need or intent to file an application is irrelevant. In any event, the cases have little or

¹⁵Nepera was decided under section 18(b)(3) of the Shipping Act, 1916, 46 U.S.C. app. § 817(b)(3), the predecessor to section 8(e) of the 1984 Act.

no precedential value because of later decisions. In addition to Schweiker and Heckler v. Community Health Services, supra, see e.g. Baldwin County Welcome Center v. Brown, supra, Office of Personnel Management v. Richmond, slip op. 495 U.S. ____ (1990).¹⁶

Finally, the FMC Investigator, Mr. Rolnitzky, acted properly in his dealings with OOCL. Accordingly, there appears to be no basis to accept OOCL's argument that it relied to its detriment on the Investigator's advice on January 5, 1990. Ms. Brownson of OOCL acknowledges that Mr. Rolnitzky stated that the purpose of his visit to OOCL's Oakland office was the investigation of an informal complaint that OOCL had misrated a shipment for Connell Bros. She stated that at that meeting, Mr. Rolnitzky, in declining to take additional documents,

. . . responded that he first wanted to review the tariff pages and bills of lading and that he would then get back to us and give us an opportunity to submit such other documents as might be necessary to support OOCL's position. I relied on Mr. Rolnitzky's statement, took no further action, and awaited his response¹⁷

It is unclear what detriment could result from this statement, as OOCL now claims, or how it justifies OOCL's failure to file its special docket application earlier. The January 5, 1990 meeting, as shown from Ms. Brownson's affidavit, involved the investigation of an informal complaint, and while tariff errors were discussed,

¹⁶See also Alacare Home Health Services, Inc. v. Sullivan, 891 F.2d 850 (11th Cir. 1990).

¹⁷Ms. Brownson also stated: "I was well aware of the tariff filing error on September 19, 1989, and should have filed a timely application for a waiver; but, I was not familiar with the FMC Special Docket procedures or with the time limitations applicable thereto." Affidavit of Ms. Brownson, at 7 and 8.

there is no indication that the matter of refunds or waiver was ever mentioned. The Commission therefore rejects OOCL's attempt to lay the blame for its late filing on the Investigator.

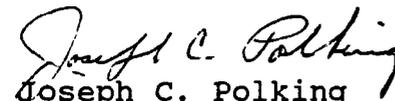
CONCLUSION

The filing of a corrected tariff and of an application within the statutory period of limitation are jurisdictional requirements. The Commission therefore finds that the ALJ acted properly in denying a waiver for the first shipment. Consequently, OOCL's Exceptions are denied and the Initial Decision is adopted.

THEREFORE, IT IS ORDERED, That the Initial Decision of Administrative Law Judge Norman D. Kline issued in this proceeding is adopted by the Commission;

IT IS FURTHER ORDERED, That within 30 days from the service of this Order, OOCL (USA) Inc. shall waive charges and publish with the Commission a tariff notice in the manner required by the initial decision, collect from Connell Bros. Company, Ltd., additional freight charges in the amount of \$26,740.97 and within 5 days thereafter furnish the Secretary with evidence of the waiver and collection of charges along with a copy of the prescribed tariff notice; and

IT IS FINALLY ORDERED, That this proceeding is discontinued.
By the Commission.


Joseph C. Polking
Secretary